LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 5 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1365

DOUGLAS NEALL PINE,
PETITIONER,

v.

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

WILLIAM H. TINNEY
2343 East Broadway
Tucson, Arizona

SKYLINE PRINTING - TUCSON, ARIZONA

TABLE OF CONTENTS

	Page
Citation to Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Statement of Facts	4
Stage of Federal Questions	6
Reasons for Granting Writ	7
Conclusion	17
Appendix A	1a
Opinion of Court Below	1a

TABLE OF CITATIONS

Agnello v. *U. S.*, 269 U. S. 20	14
Aguilar v. *Texas*, 378 U. S. 108	4, 7
Brooks v. *U. S.* (D. C. Mun. Court of Appeals) 159 A. 2d 876 (1960)	12
Davis v. *U. S.*, 327 F. 2d 301, 305 (9 Cir. 1964)	14
Draper v. *U. S.*, 358 U. S. 307, 3 L. Ed. 2d 327, 79 Sup. Ct. 329 (1959)	12
Giordenello v. *U. S.*, 375 U. S. 480	14
Henry v. *U. S.*, 361 U. S. 98, 4 L. Ed. 2d 134, 80 Sup. Ct. 168	12
Johnson v. U. S., 333 U. S. 1014	14
Jones v. *U. S.*, 357 U. S. 493, 2 L. Ed. 1514, 78 Sup. Ct. 1253 (1958)	14

Page

Judd v. *U. S.*, 89 U. S. App. D. C. 64, 190 F. 2d 649 (1951) - - - - - - - - - - - - - - - - - - 13

Mallory v. *U. S.*, 354 U. S. 449, 1 L. Ed. 2d 1479 - - - - 12

Mapp v. *Ohio*, 367 U. S. 643 (1961) - - - - - - - - 7

McDonald v. *U. S.*, 335 U. S. 451 - - - - - - - - - 14

Melton v. *State* (Fla.) 75 So. 2d 291 (1954) - - - - - - 11

Miranda v. *Arizona*, 384 U. S. 436 - - - - - - - - - - 16

Monroe v. *State*, 110 Tex. Crim. 274, 8 S.W. 2d 133 (1928) - - - - - - - - - - - - - - - - - - 13

State v. *Owen*, 96 Ariz 2.74 (1964) - - - - - - - - - 16

State v. *Pine*, 446 P. 2d 940 - - - - - - - - - - - - 2

Strand v. *Commonwealth*, 295 Ky. 694, 175 S.W. 2d 368 (1943) - - - - - - - - - - - - - - - - - - 13

Taylor v. *U. S.*, 286 U. S. 1, 6 - - - - - - - - - - - 14

U. S. v. *DiRe*, 332 U. S. 581 - - - - - - - - - - - - 13

U. S. v. *Landerman*, 32 F. Supp. 123 (1940) - - - - - - 13

U. S. v. *Reynolds*, 111 F. Supp. 589 (1953) - - - - - - 12

Wong Sun v. *U. S.*, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 - - - - - - - - - - - - - - - 22, 23

United States Statutes

Constitution of the United States, Amendment IV - - - 2

Constitution of the United States, Amendment V - - - 3

Constitution of the United States, Amendment XIV - - - 3

Arizona Statutes

Arizona Revised Statutes, Sec. 13-1403 - - - - - - - - 13

In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

DOUGLAS NEALL PINE,
PETITIONER,

v.

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Douglas Neall Pine, Petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arizona, which was entered the 14th day of January, 1969. The time for filing this petition was extended to May 4, 1969, by Mr. Justice Douglas, by an appropriate Order entered in this Court on April 11, 1969.

Opinion Below

The opinion of the Court of Appeals of Arizona, and the denial of the petition for review by the Supreme Court of Arizona is reported at 446 P. 2d 940, and is set forth in the Appendix of this petition, pp. 1a.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257(3).

Questions Presented

1. Did the illegal and void search warrant render the evidence seized inadmissible?

2. Can illegally seized evidence be the basis for probable cause to arrest when no such cause existed prior to the search?

3. Was the use of the illegal and void search warrant such coercion as to cause the subsequent confession to be involuntary?

4. Should the jury have been instructed that they could consider the defective search warrant in determining voluntariness of the confession?

5. Did the defective search warrant so poison subsequent events that the petitioner was deprived of due process?

6. Did the Court below fail to adequately review certain significant Federal constitutional issues presented by petitioner?

7. Did the accretion of error act as a deprivation of due process?

Constitutional Provisions

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner was prosecuted by the filing of an information by the Pima County Attorney for burglary of two businesses, which two counts were severed for trial.

Pre-trial motions, and course of trial motions, to suppress on the basis of an invalid search warrant were denied. Trial on both counts resulted in a verdict of guilty. Petitioner was placed on probation, and his sentence suspended for five years on both

counts, to run concurrently. A motion for new trial was denied.

On April 4, 1968, petitioner appealed to the Court of Appeals, State of Arizona, Division Two, said Court affirming the trial Court on November 13, 1968. Petitioner's motion for rehearing was filed November 26, 1968, and was denied on December 10, 1968. Petition for review by petitioner was filed December 13, 1968, and denied by order of the Arizona Supreme Court on January 14, 1969.

Statement of Facts

Two local pet shops were burglarized in Tucson, Arizona.

Officer Stewart, of the Tucson Police Department, obtained a tip from an informer, with no reputation of reliability, that the petitioner, a young college student, had committed the burglaries, and had the stolen goods at his home (Vol. I, R. 5, and Excerpt of Proceedings R. 11 and 15).[1]

The officer unknowingly obtained what the trial court ruled to be a defective search warrant (Vol. I, R. 10, 21), under the rules set forth in *Aguilar* v. *Texas* (Vol. I, R. 12), and on August 11, 1966, went to the petitioner's home, armed with the defective search warrant (Vol. I, R. 33). The warrant and affidavit, which are a part of this record, scream out their defectiveness.

The officer approached petitioner's home, thinking he had the power to enter the home (Excerpt of Proceedings, R. 14). The screen door was closed, and the inside door was open. The officer knocked on the closed screen door (Vol. I, R. 50). The officer, at this time, could see no stolen goods while the screen door was closed (Vol. II, R. 74).

The officer identified himself to a young lady who answered his knock, informed her that he had a search warrant for the

---

[1]Vol. I refers to trial transcript dated July 11 and 12, 1967; Vol. II refers to trial transcript dated July 13, 1967.

premises, and that he wanted to see the petitioner (Vol. II, R. 54 to 55). The officer then opened the screen door, and stepped into the doorway under the door jamb (Vol. I, R. 51), at "the threshold of the door" (Excerpt of Proceedings, R. 6). While the officer was standing in the doorway, he had no way of telling if there was anything in the house that had been burglarized from the two pet shops (Vol. I, R. 51). The officer then went into the house, through the doorway, and looked around (Vol. I, R. 50).

The first time the officer saw the items which were the subject of the search warrant was when he entered the home of the petitioner with the defective search warrant (Transcript of Preliminary Hearing, R. 78).

The petitioner, who had been sleeping, came from his bedroom, and approached the officer in the front part of the house. The officer then served the petitioner with the search warrant and informed the petitioner that he was a suspect in a burglary (Vol. II, R. 55 and Vol. I, R. 33).

The petitioner asked the officer if they could talk outside, out of the presence of the young lady, and he and the officer went outside (Vol. I, R. 33). The petitioner was sleepy and appeared afraid, according to the testimony of the officer (Vol. I, R. 56).

After the officer had opened the door, entered, observed stolen merchandise and served the petitioner with the defective search warrant, the sleepy, frightened and cornered petitioner, in the midst of many goldfish swimming in stolen fish aquariums, confessed.

The owners of the pet stores were called by the officer, entered the petitioner's home and identified the stolen merchandise. The officers seized some of this property and took pictures of the rest.

Pre-trial motions to suppress were denied.

The petitioner, while settling instructions, moved the trial Court to instruct the jury that the search warrant, as a matter

of law, was defective, so that counsel could effectively argue involuntariness of the confession, and its coercive effect to the jury. The instruction was denied (Vol. II, R. 86).

The petitioner was found guilty of both gurglaries. Appropriate motions, based on the questions here presented, were made to the trial court and denied. The trial court entered a judgment of guilty and sentenced the petitioner to five (5) years probation. The State remedies were sought and exhausted, resulting in this application.

Stage in Proceedings Where Federal Questions Were Raised

I. The Federal Constitutional questions directed to the search warrant, stemming from the Fourth Amendment, were raised in a pre-trial motion to suppress filed in the Clerk's Record dated October 15, 1966; in a motion to suppress during trial evidenced by the Record in the Clerk's Minute Entry of July 11, 1967, on page 1 and in the Clerk's Minute Entry of July 13, 1967, on page 1; at the time the evidence was offered as evidenced by the Record in the Clerk's Minute Entry of July 13, 1967, on page 4; at the Motion for New Trial, shown in the Record of the Clerk and filed on July 14, 1967; and in the appeal by the petitioner to the Arizona Court of Appeals in the Petitioner's Opening Brief in Questions 1, 2 and 6.

II. The Federal Constitutional questions directed to the involuntariness and the coercive nature of the confession stemming from the Fifth Amendment were raised at trial as evidenced by the Record in Vol. II of Trial Transcript at pages 59 through 67; during the settling of the instructions as evidenced by the Record in Vol. II of Trial Transcript at pages 81 through 84; at the Motion for New Trial shown in the Record of the Clerk and filed on July 14, 1967; and in the appeal by the petitioner to the Arizona Court of Appeals in the Petitioner's Opening Brief in Questions 3 and 5.

Reasons for Granting the Writ

I. DEFECTIVE SEARCH WARRANT AND NO PROBABLE CAUSE FOR ARREST.

The Constitution of the United States, in its Fourth Amendment, states:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

Mapp v. *Ohio*, 367 U. S. 643 (1961) raised this exclusionary rule under the Fourth Amendment to a constitutional mandate so that when government officials unreasonably search and seize property, the illegally obtained evidence may not subsequently be used in a criminal trial against an accused.

The officer in this case, on information from an informer who was not known to be credible, obtained a search warrant. The trial court, as a matter of law, found the search warrant to be void. The court relied upon *Aguilar* v. *Texas*, 378 U. S. 108, and its comment upon the requirements of the Fourth Amendment to the Federal Constitution.

The affidavit and search warrant read:

"IN THE JUSTICE COURT
TUCSON PRECINCT, No. ONE
COUNTY OF PIMA
STATE OF ARIZONA

STATE OF ARIZONA }
COUNTY OF PIMA } ss.

Affidavit
in Support
of SEARCH
WARRANT

"Personally appeared before me this 11th day of August, 1966, Detective J. Stewart, who, on oath, makes complaint, and deposes and says that he has and there is just, probable and reasonable cause to believe and he does believe that there is now in the possession of NEALL PINE on the premises located at 2201 E. Grant and surrounding property which consists of yellow cement block, one-story duplex apartment situated adjacent to and north of Apt. #19 at the Grantview Apt. on E. Grant Road, Tucson, Arizona, Pima County, the following property, to-wit:

1 — 100 gallon Aquarium — 5′ x 20″ x 18′ with two piece stainless steel lid with 4 lights and having black handles — all stainless parts have a polish finish.

1 — 50 gallon stainless steel and glass aquarium — "Pemco"

1 — 45 gallon stainless steel and glass acquarium.

4 — Miracle Filter

5 — Silent Giant Pumps

1 — Dynaflow Pump and Filter

10 — Boxes Biornell & Tetramin Fish Food

1 — Double Compressor

THAT YOUR AFFIANT has reason to believe that at the present time the above described stolen property is presently on the premises at 2201 E. Grant Road. The reason for the affiant's belief is that he knows through his work as a detective with the Tucson City Police Dept. and specifically as an investigator on this case, that on 11 May, 1966, and 5 August, 1966, the above-described property was stolen from Gary Faucher, the owner of Neptune Gardens at 3804 E. Grant Road and Lee R. Tamms, owner of the Red Barn Pet Shop, 4250 E. Speedway. That on 7 August, 1966, the above described article were seen in Neall Pine's apartment at 2201 E. Grant Road.

That the above mentioned property was identified as the same property that was in the possession of the respective owners of the Red Barn and Neptune Gardens before the burglaries.

"That based upon the above facts, your Affiant prays that a search warrant be issued with respect to the above location for the seizure of said property and that the same be brought before a Magistrate or held under Arizona Revised Statute 13-1450 and disposed of according to law.

S/ J. STEWART
Affiant —
Address: 110 E. Alameda

Subscribed and sworn to
before me this 11 day of
August, 1966.

S/ CLARK H. JOHNSON
Act. Justice of the Peace
Precinct No. 1 Tucson,
Arizona"

"IN THE JUSTICE COURT
TUCSON PRECINCT No. ONE
COUNTY OF PIMA
STATE OF ARIZONA

Search Warrant

County of Pima, State of Arizona
To Any Sheriff, Constable, Marshal
or Policeman in the County of Pima:

Proof by affidavit, attached hereto and made a part hereof for all purposes, having this day, been made before me by Detective J. Stewart, that there is just, probable and reasonable cause for believing that: There was a burglary of the

"Red Barn Pet Shop and of Neptune Gardens Pet Shop and that the below described property is in the possession of NEALL PINE and that the Defendant, NEALL PINE, has knowledge of the properties that are fruits of the crime and is concealing them from the police and the owner, or that Mr. NEALL PINE is the receiver of stolen property knowing the same to have been stolen.

You are therefore commanded, in the daytime (or at any time of the day or night) to make immediate search of the premises consisting of 2201 E. Grant Rd. and surrounding property: yellow cement block, one-story duplex apartment situated adjacent to the north of Apt. #19 at the Grantview Apt. on E. Grant Road, Tucson, Arizona, Pima County, located at .....in the County of Pima, State of Arizona, for the following property:

1 — 100 gallon Aquarium — 5′ x 20″ x 18′ with two piece stainless steel lid with 4 lights and having black handles — all stainless parts have a polish finish.

1 — 50 gallon stainless steel and glass aquarium — "Pemco"

1 — 45 gallon stainless steel and glass acquarium.

4 — Miracle Filter

5 — Silent Giant Pumps

1 — Dynaflow Pump and Filter

10 — Boxes Biornell & Tetramin Fish Food

1 — Double Compressor

and if you find the same or any part thereof, to bring it forthwith before me at the Justice Court, Precinct No. One, County of Pima, State of Arizona, or hold such property in your possession in according with Arizona Revised Statute Sec. 13-1450.

"Given under my hand and dated this 11th day of August, 1966.

S/ CLARK H. JOHNSON
Act. Justice of the Peace
Precinct No. 1 Tucson,
Arizona"

The officer had no knowledge of the petitioner's part in alleged burglaries, other than the information from the informant, and his knowledge from the owners that certain property, including fish aquariums, had been burglarized from a pet store. The officer, after obtaining the defective warrant, thinking he had a good warrant, served the warrant on the petitioner, searched the premises, identified and took possession of the stolen merchandise, and obtained statements against interest from the Appellant, all contrary to the Fourth and Fifth Amendments to the Constitution of the United States.

The officer did not intend to arrest the petitioner until he had searched the apartment of the petitioner. This is clear from the actions of the officer. He did not obtain a warrant for the petitioner's arrest, but rather obtained a search warrant, to look for the stolen goods first. Then, if he found the stolen goods, he would arrest the petitioner, because he would then have "probable cause" to arrest without a warrant.

In this case, however, the warrant was void. The officer must, therefore, have had probable cause to arrest the petitioner. This probable cause must have existed before the search of the petitioner's apartment. Where a police officer did not intend to arrest an accused until he was successful in first discovering something of an incriminatory nature in his possession, and upon making a search, found what he was looking for, and *then* arrested the accused, such arrest was invalid. This would be true even if the police officer were armed with a search warrant or arrest warrant, but did not execute it. *Melton* v. *State*, (Fla.) 75 So. 2d 291 (1954).

The general rule of law which is adhered to by the majority of the States is that police may not arrest on mere suspicion, but only upon probable cause, based upon the facts and circumstances known to the officer, which would justify a prudent man in believing that the accused had committed an offense. *Henry* v. *U. S.*, 361 U. S. 98, 4 L. Ed. 2d 134, 80 Sup. Ct. 168; *Mallory* v. *U. S.*, 354 U. S. 449, 1 L. Ed. 2d 1479, 77 Sup. Ct. 1356. In this case, the officer had nothing but a mere suspicion that the fish aquarium and other accessories were in the apartment when he entered the premises. The State tried to purify the search by saying that the search was incidental to the arrest. Such an argument is not valid in this case because the officer made an invalid arrest. The arrest followed the search. The search was illegal because of the defective warrant. Prior to the search the officer did not have the probable cause necessary to arrest without an arrest warrant. The State is in the position of Sambo running around the tree being chased by the tiger. In this case, instead of butter, we should have suppression.

The officer should have checked on the credibility of his informer. He should have made sure the search warrant was good. He had adequate opportunity to make such inquiry and investigation. When there is an opportunity for the police officer to make due and proper inquiry and investigation, this should be done. Good faith on the part of the arresting officer is not enough. *Henry* v. *U. S.* Ibid. Probable cause, sufficient to support an arrest without an arrest warrant, must be supported by more than bare suspicion. *Brooks* v. *U. S.*, (D. C. Mun. Court of Appeals) 159 A. 2d 876 (1960).

The unverified tip of an informer is insufficient to fulfill the constitutional requirement of probable cause. The prior reliability of the informer must first be established or his information verified before it can be considered to form a predicate for "trustworthy" information to support an arrest without a warrant. *U. S.* v. *Reynolds*, 111 F. Supp. 589 (1953); *Draper* v. *U. S.*,

358 U. S. 307, 3 L. Ed. 2d 327, 79 Sup. Ct. 329 (1959).

Section 13-1403, Arizona Revised Statutes, provides in its material part:

"A peace officer may, without a warrant, arrest a person:

* * *

"3. When a felony has in fact been committed, and he has *reasonable ground* to believe that the person to be arrested has committed it. . . ." (Italics added.)

The officer had no more than an unconfirmed tip from an unreliable informant when he entered the Appellant's apartment with a defective search warrant.

The officer had no right to enter, no right to search, and no right to arrest. All evidence obtained by the officer should, therefore, have been suppressed.

Where a police officer presents an invalid warrant to an accused who is lawfully on his premises, and an invitation is made to the executing officer to enter upon said premises and conduct a search, the same does not constitute a voluntary waiver merely because the accused acceded to the apparent authority of the officer. Any evidence obtained thereby would be inadmissible and subject to suppression by the court. *Strand* v. *Commonwealth*, 295 Ky. 694, 175 S.W. 2d 368 (1943); *U. S.* v. *Landerman*, 32 F. Supp. 123 (1940); *Monroe* v. *State*, 110 Tex. Crim. 274, 8 S.W. 2d 133 (1928). The burden of proof of proving waiver and consent by the accused is upon the prosecution. *Judd* v. *U. S.*, 89 U. S. App. D. C. 64, 190 F. 2d 649 (1951).

In this case, the State did not try to, nor did it, carry such burden of proof. The Arizona Court of Appeals, in its opinion, ignores this rule of law and opined waiver.

One premise of the petitioner is that "a search is not made legal by what it turns up". This concept is detailed in depth in an article in 47 Georgetown Law Journal 1, page 22. As stated in *U. S.* v. *DiRe*, 332 U. S. 581:

> "In law (a search) is good or bad when it starts and does not change character from its success".

In the case of *Jones* v. *U. S.*, 357 U. S. 493, 2 L. Ed. 2d 1514, 78 Sup. Ct. 1253 (1958)*, the United States Supreme Court held that:

> "It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant".

In this case, the officer did not even have "probable cause" to believe stolen goods were in the apartment of the petitioner. He was two big giant steps off base. All of the evidence obtained after the officer opened the screen door, crossed the threshold and entered the premises must be suppressed.

The opinion of the Arizona Court of Appeals justifies the seizure and subsequent arrest upon the "open view doctrine" and cites *Davis* v. *U. S.*, 327 F. 2d 301, 305 (9 Cir. 1964).

A careful reading of *Davis*, however, distinguishes those cases in which the "open view doctrine" is available. *Davis* requires, before the "open view doctrine" is available, that there be no search and no unlawful entry. In this case, there was a search, and there was an unlawful entry.

II. Warrant Coerces Confession.

The next question is whether the officer's presence, and presentment of a defective and void search warrant, in the midst of property known by the police officer and the petitioner to be stolen, was intimidating to the petitioner, and whether such

---

*Other cases supporting:
Agnello v. *U. S.*, 269 U. S. 20;
Taylor v. *U. S.*, 286 U. S. 1, 6;
Johnson v. *U. S.*, 333 U. S. 1014;
McDonald v. *U. S.*, 335 U. S. 451;
Giordenello v. *U. S.*, 375 U. S. 480.

intimidation makes inadmissible the statements against interest made by the petitioner to the officer in those circumstances. We are not deciding morality. We are deciding whether the officer had a legal right or power to be where he was. If the officer did not have that right or power, should the State be allowed to use prejudicial statements against interest, made by the petitioner? It is not hard for this writer, nor the reader, to know and feel in his bones the feeling of the petitioner when the officer presented him with a search warrant, then thought to be a valid document issued by the Court of the land, in the midst of 100 gallon goldfish tanks, known by the officer and petitioner to have been stolen. A pistol held to the head of the petitioner could have had no more intimidating effect. Such intimidation and wrongful use of power must be corrected by the court. The legal system demands, on occasion, that the morally guilty be protected. Such in this case. Clearly, the Appellant was compelled to be a witness himself, contrary to the protection of the Fifth Amendment to the Constitution of the United States insofar as it speaks of due process.

The officer in this case had no probable cause to arrest before he entered the premises. The officer had no valid warrant to enter the premises. The officer entered, saw the property, showed the petitioner the "warrant", obtained statements against petitioner's interest and obtained a confession — all the fruit of a defective warrant and illegal entry.

The "poisonous tree" doctrine is recently expressed in *Wong Sun* v. *U. S.*, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441. *In Wong Sun*, the rules of law expressed in petitioner's Opening Brief are supported as to those principles stated there and here.

Wong Sun states with clarity that evidence must be excluded which is obtained through an unlawful search. That such an exclusion includes not only physical, tangible materials, but also evidence such as declarations made by the accused. *Wong Sun* further states that the exclusionary prohibition extends as well

to indirect as well as the direct products of such invasion. Thus, *Wong Sun* would exclude all of the evidence obtained by the officer in this case, as well as all statements and confessions which flowed from the initial unlawful invasion of the petitioner's home.

As the U. S. Supreme Court stated in *Wong Sun*, when it reversed the 9th Circuit of the U. S. Court of Appeals:

> "The history of the use, and not infrequent, abuse, of the power to arrest, cautions that a relaxation of the fundamental requirements of probable cause would leave law-abiding citizens at the mercy of the officer's whim or caprice."

The guarantees of the Fourth Amendment to the Constitution of the United States are too fundamental to warrant hair-splitting distinctions, as argued by the State of Arizona. If such an entry and arrest are not to be regarded as contaminated harvest, the "fruit of the poisonous tree" doctrine will no longer serve its designed purpose of discouraging Fourth Amendment violations.

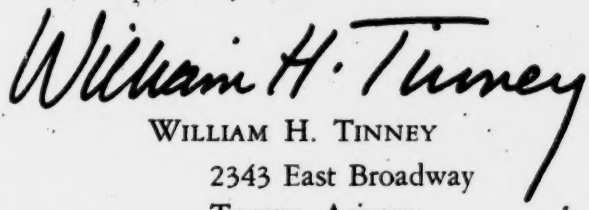
III. Jury Instruction as to Defective Warrant.

The petitioner requested the court to instruct the jury that the court had found, as a matter of law, that the search warrant was void and illegal so that the Petitioner could argue to the jury that the void search warrant coerced the admissions of the petitioner through intimidation. Under the rule in *State* v. *Owen*, 96 Ariz. 274 (1964) the jury may, after the court rules on voluntariness, disagree with the judge and reject the admission or confession. The petitioner was denied this opportunity of having the jury determine the issue of voluntariness because they were not instructed that, in law, the search warrant was void and invalid. The use of the invalid search warrant would have certainly had bearing upon the determination by the jury as to whether or not the petitioner was under what this Court, in *Miranda* v. *Arizona*, 384 U. S. 436, described as circumstances allowing the potentiability for compulsion.

Conclusion

For the several reasons set forth above, petitioner urgently prays that a Writ of Certiorari issue from this Court to review the judgment of the Arizona Court of Appeals and the Supreme Court of Arizona.

Respectfully submitted,



WILLIAM H. TINNEY
2343 East Broadway
Tucson, Arizona

Appendix A

In the Court of Appeals
State of Arizona
Division Two

STATE OF ARIZONA,
APPELLEE,
v.
DOUGLAS NEALL PINE,
APPELLANT.

No. 2 CA-CR 117

Appeal from the Superior Court of Pima County
Cause No. A-15494

Honorable William C. Frey, Judge

Affirmed

Gary K. Nelson, The Attorney General — Phoenix
Darrell F. Smith, former Attorney General
Carl Waag, Assistant Attorney General
Attorneys for Appellee

William H. Tinney — Tucson
Attorney for Appellant

KRUCKER, Judge

Information was filed against the defendant, Douglas Neall Pine, on October 17, 1966 charging the crime of burglary, two counts. The trial before a jury in July, 1967 resulted in verdicts of guilty on both counts, and on July 24, 1967 a judgment of

guilty was entered, imposition of sentence was suspended for a period of five years, and the defendant placed on probation.

The major grounds for this appeal arise under the search and seizure provisions of the Fourth Amendment of the U. S. Constitution and the Privilege Against Self-Incrimination under the Fifth Amendment of the U. S. Constitution, as applied to the states under the aegis of the 14th Amendment to the U. S. Constitution. An additional ground for appeal arises out of the failure of the trial court to grant a mistrial because of allegedly prejudicial misconduct of a witness before the jury.

Construing the record most favorably to the State, State v. Hassman, 101 Ariz. 583, 422 P. 2d 699 (1967), the relevant facts and circumstances surrounding the constitutional grounds for this appeal are as follows. Two detectives from the Tucson Police Department, armed with what they believed to be a valid search warrant, went to the defendant's apartment with purpose and intent of searching that premises and questioning the defendant in connection with two burglaries. As they approached the apartment, the main door of the apartment stood open, but an outer screen door was closed. One of the detectives knocked on the door, and in response thereto, a young woman appeared. The detectives identified themselves as police officers, and the screen door was opened, either by the young woman or by one of the detectives, for the purpose of showing the officers' identification to her. The officers asked if defendant were there. The young woman went to get the defendant, who was in another room in the apartment, and the officer, from the doorway, looked into the room, the screen door having remained open during the conversation with the young woman. At this time, and from this position, the officer observed a large aquarium and several small aquariums, and, because of a description given to the officer by the owner of one of the burglarized premises, the officer believed that the large aquarium had been taken in connection with one of the burglaries.

At this time the defendant appeared, and the officers identified themselves to him, told him they had a warrant to search his apartment, and informed him that they were investigating two burglaries and that they would like to speak with him in connection with them. The defendant stated that he knew why the officers were there, and he requested that they conduct their business outside the apartment, out of the presence of the young woman.

The defendant and the two detectives then proceeded to the sidewalk in front of the defendant's apartment, and at this time the defendant was served with the search warrant and "Miranda warnings" were given to him. The defendant, while outside the house with the officers, admitted that he had committed the two burglaries. Defendant gave the officers complete details regarding both of these burglaries, and when the conversation was finished the defendant and the two officers returned to the house, the young woman in the meantime having departed, and while inside the house the defendant went about the house pointing out to the officers the various items which he had taken in connection with the burglaries.

When this was done, one of the officers called the owners of the burglarized premises, and the respective owners later appeared in the presence of the defendant at his apartment and identified the items pointed out by the defendant as property taken from their premises at the time of the burglaries. Both owners at this time had conversations with the defendant in the course of which he again admitted the burglaries, and arrangements were made between the defendant and the respective owners to pay for the property taken and for damages done to the respective premises as a result of each burglary.

In addition to the owners of the property, a police photographer was called, and during this same period photographs were taken of the exterior and the interior of the defendant's apart-

ment, the interior photographs depicting various articles which were taken in the course of the burglaries.

When all of the foregoing transactions were completed, the defendant was taken to the city jail for booking, and then to the detective division where a written confession was taken by a stenographer.

Prior to the trial and again at the commencement of the trial, the defendant moved to suppress all of the information and evidence and admissions by the defendant which were obtained subsequent to the time that the screen door was opened in order that the detectives could exhibit their identification to the young woman who answered the door. As a basis for the motion to suppress, defendant asserted the invalidity of the search warrant, claiming that it was issued upon improper affidavit. The pre-trial motion to suppress was denied without explanation. The motion to suppress at the commencement of the trial was denied, and the trial court, although clearly of the opinion that the warrant was invalid, declined to rule on the warrant's validity, it being of the opinion that the information and evidence sought to be suppressed was obtained without the use of the search warrant.[1]

The first matter we shall consider concerns the actions of the police officer while standing in the doorway of the defendant's

---

[1] "THE COURT: Well I don't know whether [the magistrate did examine him under oath] or not, but there was no evidence before me on that. The only thing that is before me is the affidavit, the warrant, the motion to suppress. It is my conclusion for what it is worth that the warrant under the Aguilar case was defective. Now because the warrant was issued pursuant to an affidavit that was nothing more than conclusions, I agree with counsel.

* * *

"MR. PATCHELL [for the State]: Your honor, if that is your conclusion at that point may I put on further evidence?

"THE COURT: No, because I still don't see that the search or seizure or the statement of the defendant was obtained as a result of this unlawful, illegal warrant. I don't think that the search or the questioning was unreasonable under the circumstances and I'm going to deny the motion."

apartment, and whether what the officers saw at that time and place was the fruit of an unreasonable search or seizure.

The officer knocked on the door, a young woman answered the door, the screen door was opened for the purpose of showing identification to her, and at this time the officer looked into the room, there observing a large fish tank the appearance of which corresponded to a description of property taken in the burglaries. The trial court ruled that the foregoing sequence of events did not constitute an unreasonable search, and that the observations of the officer were made without the use of the search warrant.

We are constrained to agree with the ruling of the trial court. Aside from the fact that the officers had the search warrant in their possession at this time, there is nothing whatsoever to indicate that the presence of the officers in the doorway was secured by use of the search warrant. It is not enough that the officers had what they believed to be a valid warrant and that they believed the warrant gave them the power to search the apartment, and where there is nothing in the record to indicate that the officers made any use of the warrant at this time, then the admissibility of the officer's observations from the doorway under the doctrine of Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) should be determined without further reference to the search warrant.

The Fourth Amendment to the U. S. Constitution does not prohibit all searches and seizures, but only those that are unreasonable. State v. Baca, 1 Ariz. App. 16, 398 P. 2d 924 (1965).

Of the many possible situations recognized by the courts as not constituting unreasonable searches, the one most appropriate to the case before us appears to be the "open view doctrine." Under this doctrine a peace officer who has reached a location by lawful means and who, from this location, can, by the mere act of looking, observe what he believes to be contraband, is ". . . not required to close (his) eyes and need not walk out

and leave the article where (he) saw it." Davis v. U. S., 327 F. 2d 301, 305 (1964). The entry of the officer in this case, to the extent that there was an entry, and his placing himself in the doorway of the defendant's apartment, was not an unlawful intrusion. The outer screen door was opened without objection, and the presence of the officer in the doorway was likewise achieved and maintained without objection. *See*, Davis v. U. S., supra.

It was at this time, and from this location, that the officer observed the aforesaid fish tank, and we are of the opinion that this observation did not constitute an unreasonable search.

It is noteworthy that even after the officer observed what he believed to be stolen property, he did not seize it or utilize it or even make reference to it, and instead he continued with his originally stated purpose, that being to talk to the defendant with regard to the burglaries.

We move next to defendant's proposition that his statements and admissions made during the course of the conversation with the police officers were coerced by virtue of the fact that the police officers presented him with an invalid search warrant. We are unable to discern between the possibilities of coercion which might be produced by a valid search warrant and those which might be produced as a result of an invalid search warrant, believed by the relator to be valid. If a person who makes a confession or an admission claims to have been coerced, then the real issue is his state of mind, Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and not whether the means by which he is said to be coerced possess all those qualities which the person making the confession or admission believes them to possess. The record, before the court alone and before the jury, shows that before the defendant made any admissions or before he confessed he was served with the search warrant. This would be the fact to establish coercion, if any, and a confession or admision, if coerced by the service of this war-

rant, should be inadmissible regardless of whether the warrant was valid or not. In this case, as in most, coercion is a question of fact, and the constitutional procedures to determine voluntariness were followed by the trial court. We find nothing in the record to indicate that the findings of the trial court, and the findings of the jury that there was no coercion, were erroneous.

The next proposition cited as error by the defendant is the failure of the trial court to give an instruction which reads as follows:

> "The search warrant and underlying affidavit were inadequate and because they were inadequate as a matter of law were of no effect, illegal and void."

Defendant claims that this instruction should have been given to enable the jury to pass on the voluntariness of the defendant's confession.

As we have previously indicated it was not the validity of the search warrant which would determine voluntariness, or its antithesis, coercion; defendant's state of mind, and evidence bearing thereon, are what the jury should consider in determining the voluntariness of the confession. Coercion will not become otherwise depending on the validity or the efficiency of the means used to produce it, and, likewise, an absence of coercion will never become coercion by a disclosure that the means asserted as the basis of the coercion lacked the physical or legal capabilities which they appeared to have.

We shall next consider the assertion by the defendant that he was arrested without probable cause, that his apartment was then searched incident to his allegedly unlawful arrest, and that the trial court erred in admitting the evidence obtained as a result of this search since, the arrest being unlawful, the search incident thereto was likewise unlawful.

The only evidence which specifically fixes the time of the

defendant's arrest is to be found in the transcript of the proceedings in connection with defendant's motion to suppress which was made some nine months before the time of the trial. The testimony in this transcript relates that defendant was placed under arrest after he had confessed to both of the burglaries during the course of his conversations with the detectives outside his apartment, and that after the arrest the defendant and detectives waited for the young woman to leave and then entered the apartment, at which time the defendant identified the stolen property which was seized by the officers.

"A peace officer may, without a warrant, arrest a person:

* * * *

3. When a felony has in fact been committed, and he has probable cause to believe that the person to be arrested has committed it.

4. When he has probable cause to believe that a felony has been or is being committed and reasonable ground to believe that the person to be arrested has committed or is committing it." A.R.S. ‡ 13-1403, 5 A.R.S. (as amended)

* * *

An arrest without a warrant must be based upon probable cause, and probable cause will exist where the facts and circumstances within the knowledge of the arresting officers are sufficient to warrant a man of reasonable caution in the belief that an offense had been committed and that the defendants had committed it. State v. Pederson, 102 Ariz. 60, 424 P. 2d 810 (1967).

We are of the opinion that where an officer knows that a burglary has been committed, and where the officer lawfully observes property in the defendant's apartment which fits the description of property taken in a burglary, and where the defendant, without coercion, confesses that he committed the bur-

glaries under investigation, then an arrest by an officer possessed of such information is lawful.

There has been no claim by the defendant that the search of the apartment subsequent to his arrest was not an incident to that arrest, the grounds being set forth as a basis for excluding the results of that search being that the arrest itself was unlawful. Inasmuch as we have determined that the arrest was lawful, the evidence obtained as a result of the subsequent search was not the result of the unreasonable search or seizure, being incident to the arrest. It does not violate the Fourth Amendment to search, in connection with a lawful arrest, and without a search warrant, the premises where the arrest was made, where these premises were under the control of the person arrested. United States v. Rabinowitz, 339 U. S. 56, 70 St. Ct. 430, 94 L. Ed. 653 (1950).

The final constitutional issue presented by defendant asserts that the allegedly invalid search warrant was a "poisonous tree", and that all evidence obtained as the result of the use of this warrant was, therefore, inadmissible under the doctrine of Wong Sun v. U. S., 371 U. S. 471, 83 St. Ct. 407, 9 L. Ed. 2nd 441 (1963).

As our discussion of the previous questions presented indicates, the evidence complained of in this case did not result from the use of the search warrant; its validity or invalidity was not determined below and will not be determined in this court. If we assume, without granting, that the search warrant did constitute a "poisonous tree", we cannot see that this "poisonous tree" has borne any fruit, and in the absence of such fruit, the doctrine announced in *Wong Sun*, supra, has no application.

The last matter we shall consider in this appeal is defendant's claim of error on the part of the trial court in refusing to grant a mistrial, based on a statement made by one of the witnesses in the presence of the jury.

Defendant was charged with the commission of two separate burglaries, occurring approximately three months apart, and he was given a separate trial for each offense. In the course of the first trial, one of the arresting officers was testifying as to statements made by the defendant during his conversations with the officer outside the defendant's home. The officer testified that the defendant told him that he (the defendant) had committed the *burglaries*, and at this point, counsel for defendant asked that the jury be excused and immediately moved for a mistrial. The asserted grounds for the mistrial were that the officer, by using the word "burglaries" in the plural form had introduced evidence of other offenses having no relation to the crime for which defendant was then being prosecuted, and that the result of the use of this term was prejudice to the defendant such as would warrant a granting of a mistrial.

In Arizona the principle is well established that it is error to admit evidence that the accused has committed other offenses entirely distinct and independent of that for which he was on trial. State v. Thomas 71 Ariz. 423, 229 P. 2d 246 (1951).

We are of the opinion that the testimony of the witness, in using the term, "burglaries", was not error. The witness had just finished testifying to the events up to the point where the young lady departed from the doorway to get the defendant, and the witness was asked: "Q. What happened then?" The witness's answer to this consisted of a narration of events starting at the time that the defendant appeared in the frontroom and leading outside the house to the place where the defendant was advised of his rights, and it was at this time that the witness testified that the defendant admitted committing the burglaries.

It must have been well known to both the defendant and his attorney that the defendant during the sequence of events being described by the witness, had confessed to both of the burglaries. In spite of this, the witness was permitted to testify in narrative form for some 18 lines of testimony before the term

"burglaries" was used. We feel that the defendant, if he desired to strictly limit the testimony of the witness to matters relating only to the crime then being tried, was required at least to request that the narrative testimony be discontinued, and that the witness be allowed to respond only to specific questions to which a proper objection might have been made. Defendant made no such request.

Outside the presence of the jury the witness testified that in using the term "burglaries" he was relating the exact term used by the defendant at that time. It is fundamental to our system of justice that the witness who testifies under oath be permitted, and indeed required, to speak truthfully in the giving of his testimony. So valued is this concept by our society that one who testifies without at least a belief in the truth of his testimony is guilty of a felony. See, A.R.S. ‡ 13-561, et seq. This witness was asked to describe what happened, and we are of the opinion that his attempts to do so with exactitude, when he is permitted, without objection or request, to testify in a narrative form, should not be said to form the basis of error.

In addition to the foregoing, we are further of the opinion that the refusal to grant a mistrial was proper, for the reason that the trial court was justified in its finding that use of the term "burglaries" did not result in prejudice to the defendant.

The test in this State for determining the existence of prejudice has been announced by our Supreme Court as follows:

> ". . . This Court has held the test to be: Had the error not been committed was there reasonable probability that the verdict might have been different. . . ." State v. Ybarra, 97 Ariz. 200, 202, 398 P. 2d 905, 907 (1965)

That case stated that the "change in outcome" test is dependent on an examination of the entire record. We have done so, and the use of the term "burglaries" is the sole reference to any possibility that the defendant had been charged with or had

committed another offense. The trial court summarized its reasoning as follows:

> ". . . The motion for mistrial is denied. It appeared to me that if the witness has said burglaries, plural, the intonation of his voice was such that I didn't catch it, and I'm sure that had it been emphasized in any way it would have been apparent to me, and certainly under the circumstances that the testimony was given, I doubt very seriously that it's going to have any effect or import on the jury. As Mr. Patchell pointed out, I think that it is not unreasonable to assume that the jurors are going to, if they consider the word burglaries at all, they're going to consider it as the burglary of the Red Barn Pet Shop as more than one item was taken. . . ."

We are in agreement with the conclusions of the trial court, and we find that the use of the term "burglaries", in the context of the testimony, and considering the entire record, did not result in any prejudice to the defendant.

Having found no error below, it is the opinion of this court that the judgment shall be affirmed.

HERBERT F. KRUCKER, Judge

Concurring:

JAMES D. HATHAWAY, Chief Judge

JOHN F. MOLLOY, Judge

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 29 1969
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1365 [redacted]

DOUGLAS NEALL PINE,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

GARY K. NELSON
The Attorney General
of the State of Arizona

CARL WAAG
Assistant Attorney General
159 Capitol Building
Phoenix, Arizona 85007

Attorneys for Respondent

CASES CITED

Case	Page
Aguilar v. Texas 378 U.S. 108 84 S.Ct. 1509 12 L.Ed.2d 723 (1964)	12
Bailey v. United States 386 F.2d 1 (5th Cir. 1967)	14
Davis v. United States 327 F.2d 301, 305 (9th Cir. 1964)	8,9,11,17
Jones v. United States 357 U.S. 493 78 S.Ct. 1253 2 L.Ed.2d 1514 (1958)	12
Lane v. United States 321 F.2d 573 (5th Cir. 1963)	14
People v. Georgev 38 Ill.2d 165 230 N.E.2d 851 (1967)	11
People v. Vasquez 63 Cal.Rptr. 885 (1967)	9
Rogers v. United States 330 F.2d 535 (5th Cir. 1964)	17

Case	Page
Ruiz v. State 32 Ariz. 121 256 P. 362 (1927)	11
State v. Bell 270 N.C. 25 153 S.E.2d 741 (1967)	11
State v. Carpenter 181 Neb. 639 150 N.W.2d 129 (1967)	9
State v. Kelly 99 Ariz. 136 407 P.2d 95 (1965)	12
State v. McMann 3 Ariz.App. 111 412 P.2d 286 (1966)	12
State v. Musgrove 2 Ariz.App. 505 410 P.2d 127 3 Ariz.App. 155 412 P.2d 724 385 U.S. 979 (1966)	14
United States v. Martin 386 F.2d 213 (3rd Cir. 1967)	10

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1365 Misc.

DOUGLAS NEALL PINE,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION
FOR WRIT OF CERTIORARI

OPINION BELOW, JURISDICTION, QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS AND STATEMENT OF THE CASE

Respondent accepts petitioner's presentation of the above referenced matters in his petition.

STATEMENT OF FACTS

Petitioner sets forth what he denominates a "statement of facts".

There is nothing in the record to indicate the existence of "an informer, with no reputation of reliability". There was no ruling by the trial court that the search warrant in question was defective. Had there been such a ruling, the ruling would have been attacked on cross appeal in the Arizona court.

At page 5 of his brief, petitioner claims that "While the officer was standing in the doorway, he had no way of telling if there was anything in the house that had been burglarized from the two pet shops (Vol. 1, R. 51)". The State of Arizona refers the Court to Vol. 1, page

51 of the transcript, where nothing whatever concerning Neptune Gardens (one of the pet shops) is mentioned.

The witness stated that no loot from the Red Barn (the other pet shop) was seen. The testimony at Vol. 1, page 8 was as follows:

> "Question: And the door had been opened for you?
>
> Answer: Yes.
>
> Question: And you saw those items in Mr. Pine's apartment?
>
> Answer: The fish tanks, yes."

And at Vol. II, pages 17-18:

> "Q Did you look through the screen door when you approached Mr. Pine's house? When you went up and knocked, did you look into the house, through the screen door?
>
> A No, I didn't look in until after the door was opened.

Q Who opened the door?

A The female that answered the door.

Q Did you ask her to open the door?

A I believe I did so that I could show her my identification.

Q And you did do that? You did show her your identification?

A Yes, sir.

Q While you were showing her your identification, did you see anything inside the apartment?

A Yes, sir.

Q Anything significant to you?

A Yes.

Q What did you see?

A What I believed to be a hundred gallon aquarium.

Q Referring you again to State's

Exhibit Number 8 for identification, is that what you saw when you refer to the hundred gallon aquarium?

A Yes, sir."

The record discloses at Vol. 1, pages 33-34, that the presentation of the search warrant and the conversation which ensued occurred outside the house in the car after the detective had already seen enough evidence to prove petitioner guilty beyond a reasonable doubt. Further reference will be made to relevant parts of the record in connection with the arguments.

ARGUMENT

RESPONDENT'S ARGUMENT ON THE QUESTION WHETHER THE WRIT SHOULD BE GRANTED

Petitioner argues that there was a defective search warrant. Examination of the warrant and of the affidavit supporting it reveals no defect. The trial court did not rule that the warrant was defective, but the question is entirely irrelevant to the question of the admissibility of evidence, since the warrant had nothing to do with that evidence. The trial court stated:

> "Prior to the trial and again at the commencement of the trial, the defendant moved to suppress all of the information and evidence and admissions by the defendant which were obtained subsequent to the time that the screen door was opened in order that the detectives could exhibit their identification to the young woman who answered the door. As a

basis for the motion to suppress, defendant asserted the invalidity of the search warrant, claiming that it was issued upon improper affidavit. The pretrial motion to suppress was denied without explanation.

The motion to suppress at the commencement of the trial was denied, and the trial court, although clearly of the opinion that the warrant was invalid, declined to rule on the warrant's validity, it being of the opinion that the information and evidence sought to be suppressed was obtained without the use of the search warrant. [1]

"1 'The Court: Well, I don't know whether [the magistrate did examine him under oath] or not, but there was no evidence before me on that. The only thing that is before me is the affidavit, the warrant, the motion to suppress. It is my conclusion for what it is worth that the warrant under the Aguilar case was defective. Now because the warrant was issued pursuant to an affidavit that was nothing more than conclusions, I agree

with counsel.

* * *

'Mr. Patchell [for the State]: Your honor, if that is your conclusion at that point may I put on further evidence?

'The Court: No, because I still don't see that the search or seizure or the statement of the defendant was obtained as a result of this unlawful, illegal warrant. I don't think that the search or the questioning was unreasonable under the circumstances and I'm going to deny the motion.'"

Petitioner attempts to distinguish Davis v. United States, 327 F.2d 301, 305 (9th Cir. 1964) on the basis that in the instant case there was a search and an unlawful entry. There was no search of the apartment within the accepted meaning of the word, since the aquarium was in plain view as the officer stood at the door.

In State v. Carpenter, 181 Neb. 639, 647, 150 N.W.2d 129 (1967), the Court said:

> "A search implies some exploratory investigation. It is not a search to observe that which is open and patent, in either sunlight or artificial light."

In People v. Vasquez, 63 Cal.Rptr. 885, 888 (1967) it was said: "The mere looking at that which is in plain sight is not a search." When such items are seen under these circumstances, it is not necessary to obtain a search warrant before seizing the goods.

In Davis v. United States, 327 F.2d 301 (9th Cir. 1964) narcotics agents went to a house to talk to the defendant. They were admitted to the house by a child. On entering, the agents noticed a waste basket containing marijuana in plain sight five feet from the door. The Court, in stressing

that this observation did not constitute a search, stated:

> "* * * 'It is well established that it is not a search to observe what is open and patent either in daylight or in artificial light.' United States v. Lee, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202; Boyd v. United States, 4 Cir., 286 F. 930; Smith v. United States, 4 Cir., 2 F.2d 715; Safarik v. United States, 8 Cir., 62 F.2d 892, 895 * * *.' Petteway v. United States, 261 F.2d 53, 54 (4 Cir. 1958). As was said by Judge Holtzoff in United States v. McDaniel, 154 F.Supp. 1,2 (D.C. 1957), affirmed 255 F.2d 896 (D.C. Cir. 1958) and cert. denied 358 U.S. 853, 79 S.Ct. 82, 3 L.Ed.2d 87 (1958); Williams v. United States, 363 U.S. 849, 80 S.Ct. 626, 4 L.Ed.2d 1732 (1960). 'if, without a search and without an unlawful entry into the premises, a contraband article * * * is seen in the premises, the police are not required to close their eyes and need not walk out and leave the article where they saw it.' * * *" (p. 305)

See United States v. Martin, 386 F.2d 213

(3rd Cir. 1967); Ruiz v. State, 32 Ariz. 121, 256 P. 362 (1927); People v. Georgev, 38 Ill.2d 165, 230 N.E.2d 851 (1967). Once contraband or illicit goods are seen, the officer need not close his eyes and walk away. Davis v. United States, supra. The officer, in fact, would be derelict in his duty if he failed to seize such items.

When no search is made, no search warrant is required. As was well stated in State v. Bell, 270 N.C. 25, 153 S.E.2d 741 (1967):

> "Moreover, it has been recognized in this jurisdiction that 'Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without a warrant where there is no need of a search, and where the contraband subject matter is

fully disclosed and open to the eye and hand.' State v. Giles, 254 N.C. 499, 119 S.E.2d 394." (p. 748)

The officer was clearly obliged to seize the property and it was admissible in evidence against the petitioner.

Had a search been necessary, and had the warrant been used to justify it, there would be no greater problem. The affidavit is sufficient under the holdings of the Arizona courts in State v. Kelly, 99 Ariz. 136, 407 P.2d 95 (1965); and State v. McMann, 3 Ariz. App. 111, 412 P.2d 286 (1966). Nothing in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) or Jones v. United States, 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958) requires the suppression of evidence obtained on a warrant issued on an affidavit

similar to that herein. The affidavit on its face is sufficient because it states that the above described articles were seen in Neall Pine's apartment and states positively that the officer knows they were seen. It is not necessary for him to explain how he knows they were seen. He need not prove the identity of the items beyond a reasonable doubt, nor establish "a chain of evidence" to show how they reached the apartment. The fact that an informer, if informer there was, and petitioner's brief cites no reference to the record indicating the existence of any such person, was able to describe the items so as to permit the detective to identify them furnishes all the voucher necessary to establish him as a reliable

informer. See State v. Musgrove, 2 Ariz.App. 505, 410 P.2d 127, reh. den. 3 Ariz.App. 155, 412 P.2d 724, cert. den. 385 U.S. 979 (1966). See also, Bailey v. United States, 386 F.2d 1 (5th Cir. 1967) and Lane v. United States, 321 F.2d 573 (5th Cir. 1963), where the officer's knowledge of some matters mentioned in the tip is held to be sufficient corroboration to establish reliability of an informer. The cases requiring that reliability of an informer be established to the satisfaction of the magistrate before a warrant is issued are invariably cases involving a search for contraband of a fungible nature and are cases where the informer provides the officer's knowledge of the existence of a crime, as well as the name of the perpetrator.

They are cases where there is a danger that the informer might be inventing a charge out of whole cloth; or where it is necessary to place reliance on his judgment that the material is actually contraband, not innocent matter resembling contraband. When an informer is able to describe loot so as to permit its identification, the fact that he can do so testifies to his reliability. Nothing further is required to establish probable cause.

The trial court did not rule that the search warrant was defective, as petitioner claims. The court never ruled on the question. Judge Fry did indicate at Vol. 1, page 21 of the transcript that he might have so ruled had its legality been in question.

Petitioner repeatedly refers to an informer or an informant, but the record does not reveal that there is any such person in existence. The affidavit of J. Stewart certainly does not refer to any such person.

When Officer Stewart arrested petitioner, he had seen in petitioner's house loot from two burglaries. He had not only probable cause to arrest him, but evidence sufficient to support a finding beyond a reasonable doubt of petitioner's guilt.

Petitioner claims that he was arrested without probable cause. Officer Stewart made the arrest after he had enough evidence to sustain the conviction. There is no question of the existence of probable cause. He did not search the premises, and his seizure of the evidence has nothing

to do with the validity of the search warrant. The validity of the search warrant is not in issue.

The arrest was effected after the officer had seen the loot from the burglary in the petitioner's apartment. He saw the loot while standing at the door establishing his identity as a police officer. The seizure needs no support of a warrant nor of an arrest. It is a police officer's duty to take into his custody the property of a victim when he finds it in the possession of a thief. See Davis V. United States, supra, and Rogers v. United States, 330 F.2d 535 (5th Cir. 1964).

Petitioner claims that his confession was inadmissible because he was intimidated by an illegal search warrant.

As the Arizona Court of Appeals held, if his confession was the product of intimidation by a warrant, legal or illegal, it was inadmissible; and the question of the legality or illegality of the warrant has nothing to do with the matter. There was no evidence that the confession was the product of the exhibition of the warrant, legal or illegal.

The question of the propriety of petitioner's request for a jury instruction to the effect that the search warrant was void and illegal is no more before this Court than the other questions petitioner attempts to raise. The petitioner has nowhere set out language of the instruction he claims that the trial court erred in failing to give at his request.

The question was not properly raised before the Arizona Court of Appeals, and it cannot be raised before this Court. Were the question properly before this Court, the wording of the instruction would be irrelevant, since in no conceivable form would it be proper to instruct as petitioner requested.

In the first place, as demonstrated above, the warrant was not improperly issued; but even if it were, the jury's determination of the voluntariness of the confession given by the petitioner has nothing to do with whether or not the warrant was proper or improper. If the confession were involuntary, if it were compelled, it it were anything other than the free and voluntary act of the peti-

tioner, then it was inadmissible. If compelled by a legal search warrant, it is no less inadmissible than if compelled by an illegal one. It was not compelled by anything but the petitioner's desire to tell the truth.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari herein should be denied.

Respectfully submitted,

GARY K. NELSON
The Attorney General

CARL WAAG
Assistant Attorney General

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

CARL WAAG, being first duly sworn, upon oath, deposes and says:

That he is an Assistant Attorney General of the State of Arizona; that as such he served the attorney for the petitioner in the foregoing case by forwarding two (2) exact copies of response to petition for writ of certiorari in a sealed envelope, first class postage prepaid, and depositing same in the United States mail addressed to:

William H. Tinney
2343 East Broadway
Tucson, Arizona

this _____day of May, 1969.

_____

SUBSCRIBED AND SWORN to before me this _____day of May, 1969.

_____
Notary Public

My commission expires: